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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE COPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (App. 434) is reported at 406 F.2d 759. The opinion of the district court (App. 26) is reported at 261 F. Supp. 954. The opinion of the Secretary of the Interior (App. 352) is reported at 71 I.D. 169.

JURISDICTION

The judgments of the court of appeals were entered on February 4, 1969 (App. 48, 390, 405, 427). On April 26, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and includ-

ing June 4, 1969, and on May 27 he granted a further extension to June 19, 1969. The petition for a writ of certiorari was filed on June 10, 1969, and granted October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a 1935 holding of this Court that the Secretary of the Interior had exceeded his authority in cancelling certain mining claims must be given retrospective effect as to other mining claims previously cancelled on the same ground and which were not reasserted until the 1950's.

2. Whether the 1935 decision of this Court in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, should be overruled or limited to its peculiar facts.

STATUTES AND REGULATIONS INVOLVED

I. The General Mining Act of 1872, 17 Stat. 91, 30 U.S.C. 22, 26, 28, and 29, provides in relevant part:

> § 22. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase * * *.
>
> § 26. The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States * * * governing their possessory title, shall have the ex-

clusive right of possession and enjoyment [of those locations] * * *.

§ 28. * * * On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. * * * [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * *

§ 29 A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim * * * who has * * * complied with the terms of [Sections * * * 26–28 * * * of this title] may file in the proper land office an application for a patent * * *. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors * * *. If no adverse claim shall have been filed with the Manager of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * * and thereafter no objection from third parties to the issuance of a patent shall be

heard, except it be shown that the applicant has failed to comply with the terms of sections * * * 26–28 * * * of this title. * * *

II. The Mineral Leasing Act of 1920, 41 Stat. 445, 30 U.S.C. 241(a) and 193, provides in relevant part:

§ 241(a) The Secretary of the Interior is authorized to lease * * * any deposits of oil shale * * * belonging to the United States * * *. Any person having a valid claim to such minerals under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation. * * *

§ 193. The deposits of * * * oil shale * * * herein referred to, in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in sections * * * 241 * * * of this title, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

STATEMENT

Respondents claim to be the present owners of four groups of claims to oil shale mining locations in Colorado. In the course of an attempt to obtain full ownership rights (patents) over the land and minerals claimed, they sought administratively and in the courts to require the Secretary of the Interior to dis-

regard earlier decisions cancelling those claims. The claims were cancelled in Department proceedings brought in 1928–1932 against these and a large number of other oil shale claims on the ground that the then owners of the claims had failed to meet a statutory obligation to expend $100 annually in labor and improvements on the development of each claim, 30 U.S.C. 28. The first of the present proceedings was not initiated before the Secretary until 1959. In the cases which were brought before him,[1] the Secretary refused to reopen the earlier cancellations, except to the extent it appeared that proper service had not been made in those proceedings. *Union Oil Co. of California,* 71 I.D. 169; 72 I.D. 313. The district court and the court of appeals, however, held that the cancellations based on the assessment work ground had been void from the start, and that the Secretary could give them no effect however tardily the present claims might seem to have been presented (App. 46, 47, 442).

THE LEGISLATIVE SETTING OF THE ASSESSMENT WORK CONTROVERSY

An understanding of the setting in which this issue arises properly begins with consideration of the mining law under which these claims were first made. The General Mining Act of 1872, 17 Stat. 91, opened

[1] Three of the four groups, Umpleby, Napier and Brown, applied to the Secretary for patents in the late 1950's. The fourth group, the Oil Shale Corporation, went directly to district court to seek a declaratory judgment that it would be entitled to processing of its patent claims without regard to any prior cancellation on assessment work grounds. The Secretary's actions were appealed to the same district court, and the four cases were consolidated for trial and appeal.

"all valuable mineral deposits in lands belonging to the United States * * * to exploration and purchase." In order to encourage prospecting and actual resource development, and to discourage simple speculation in or aggregation of land, the statute required the claimant actually to locate a valuable mineral deposit, and further provided, for each "location," that "until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. 28. Failure to do this assessment work, in general, entitled others to relocate the claim, as if no location had ever been made. But if the locator resumed assessment work before a relocation occurred, the original location prevailed. Once $500 in development work had been done upon the claim, a nominal price had been tendered, and procedures testing the validity of his discovery and possible competing claims had been followed, the locator was entitled to a patent, conferring ownership rights to the land and minerals concerned.

Obviously, under this scheme a location was a valuable property right which, if maintained, could not be defeased by others, including the government. If it was not maintained, the statute provided a mechanism—relocation—by which other prospectors could obtain it for their own, more diligent mining purposes. This mechanism well served the statute's development purposes. The statute did not state, however, whether and under what circumstances the government could recover its rights to the land, includ-

ing the right to exploit minerals on it, if a locator failed to fulfill the assessment work requirement.

Difficulties with the Mining Act scheme began to become apparent in connection with prospecting for liquid petroleum, which had been brought under the mining laws in 1897, 29 Stat. 526. Unlike metalliferous minerals and oil shale, petroleum occurs only at great depths. But a valid location under the Mining Act can be obtained only upon actual discovery; while the law might protect one drilling for oil against forceful interference, the prospector got no exclusive right to the premises until he actually struck oil. Since the size of a location which could be obtained upon discovery was limited, and drilling expensive, oil prospecting was both chancy and—where oil was found—likely to be highly exploitive. Wells would be crowded together on the located premises and an effort made to drain the pool before someone else drilling at another spot could tap it.

In 1909, concern over these problems, and their impact upon the fuel-oil dependent naval forces in particular, led the President to withdraw a large amount of land suspected to be oil-bearing from exploration, location, and purchase under the Mining Act. In his Executive Order he provided, however, that "[a]ll locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." Among the controversies this action precipitated was whether the land withdrawn included land on which drilling or other development activity was taking place but on which no

discovery—and hence no valid claim—had yet been made. This issue was ultimately resolved in the courts against such withdrawal, *e.g., Consolidated Mutual Oil Co.* v. *United States,* 245 Fed. 521 (C.A. 9), but in the meantime Congress had passed an act, basically confirmatory of the presidential withdrawal power, which expressly declared:

> That the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil- or gas-bearing lands and who, at such date, is in the diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work. [Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 142.]

The effect of the withdrawal of oil and gas lands, and other withdrawals which had been made of coal and phosphate-bearing lands, see, *e.g., United States* v. *Midwest Oil Co.,* 236 U.S. 459, 478–479, created a very substantial pressure for revised federal mining laws concerning these minerals. The imminence and ultimate coming of the World War, the desire of the western states for renewed life in their exploitative industries, and fears of depletion and of monopolistic sequestration of those resources still available to the public all contributed to this pressure. See, *e.g.,* 56 Cong. Rec. 6995 (1918). Beginning in 1914 with H.R. 16136, a bill to authorize exploration for and disposition of coal, phosphate, oil, gas, potassium and sodium on public lands, see H.Rep. No. 668, 63d Cong., 2d

Sess. (1914), a mineral leasing program was considered by each Congress until the Mineral Leasing Act of 1920 was passed by the Sixty-Sixth Congress, 41 Stat. 437.

Each of the drafts sought to deal, *inter alia,* with the problem which had concerned the President and the Congress at the time of the oil withdrawals—what to do about persons actively prospecting at the time the change was made. Each provided, in more or less identical terms, for two modes of handling that problem. Any person having a valid claim (including oil prospectors in the course of seeking discovery) could upon relinquishment of his claim obtain a lease under the provisions of the act for the land relinquished (*e.g.,* 30 U.S.C. 228, 241); or, a person with a valid claim who maintained it thereafter in compliance with the laws under which it was initiated could perfect it under those laws. See, *e.g.*, S.Rep.No. 319, 64th Cong., 1st Sess. 3–6 (1916, regarding H.R. 406); H. Rep. No. 563, 65th Cong., 2d Sess. 5, 8, 15–18 (1918, regarding S. 2812). Discussion of the prior claim problem in the reports and in the Congress was almost exclusively limited to the issue which had been controversial in 1909 and 1910, how to deal with persons who were drilling for but had not yet found liquid oil when the Act was passed. Thus, in enacting the statute in 1920, Congress inserted the words "including discovery" in the maintenance-of-claim provision to make clear that the solution first adopted by the President in 1909 and accepted by Congress in 1910 was carried forward into the new act, 58 Cong. Rec. 4577–4585

(1919). As passed, the maintenance-of-claim provision, now embodied in 30 U.S.C. 193, stated:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in this Act [*i.e.*, by leasing], except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. [41 Stat. 451.]

THE OIL SHALE CLAIMS

Because anyone who actually did strike oil and thus obtain a valid location under the Mining Act would either proceed immediately to patent or, more-or-less automatically in the exploitation of his claim, spend the $100 annually required to maintain the claim, Congress had no reason in 1920 to discuss the meaning of the requirement that claims be maintained as applied to valid locations, and no particular attention was paid to that issue. Disputes over that question subsequently arose only with regard to oil shale claims, such as are at issue here.

Oil shale exists in prominently exposed outcroppings and vast quantities throughout western Colorado and bordering parts of Wyoming and Utah. It is a mixture of rock and oil-producing substance from which oil may be distilled but—unlike coal—it is unusable as fuel in its natural state. Thus, although easy to find it is hard to use. No commercially feasible extractive process for mining the rock and distilling

the oil was known in 1920 or is known now. Yet it is apparent that such a process will have to be found as the world's supplies of crude (liquid) oil are used, and at various times pessimistic estimates of the remaining crude oil supply have made that moment seem nearer.

The World War I period was the first of those times. In 1916 the oil shale lands were for the first time classified as mineral lands (and thus removed from acquisition under the non-mineral land laws), and a number of Naval Oil Shale Reserves were established.[1] There was an immediate rush to locate claims on these lands; while the exact number of locations cannot be known, the investigations and cancellation proceedings of the 1920's and 1930's revealed more than 30,000 such claims embracing more than 4,000,000 acres of public domain (App. 68). However, although the shale was readily accessible, nowhere did mining or processing begin; the speed with which large numbers of claims were made by small groups of men[2] made clear that the claimants were chiefly speculating on the value the lands would have should the apparent shortage in liquid petroleum resources prove incurable.

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[1] One of these included the so-called Oyler claims, involved here in the *Brown* case. Under a reservation clause similar to that which appeared in the President's 1909 order, those claims would be recognized so long as they remained valid, but otherwise revert to the reserve.

[2] See Appendices A and B to the government's district court brief, printed and submitted as a supplement to the government's brief in this Court (esp. pp. 5–9).

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By the early 1920's the war had ended, the Mineral Leasing Act had encouraged the adoption of more efficient oil well management techniques (leading to better utilization of existing pools) and vast additional crude oil resources had been found. The interest in oil shale flagged. Only a very few leases and patents were sought. On the other outstanding claims, assessment work ceased to be done. The speculative bubble, for the moment, had burst. But because the Mineral Leasing Act had ended the possibility of *new* locations being filed in place of those which were not being kept up, the thousands of claims located in the earlier excitement remained unchallenged on the books.

In these circumstances, the Secretary sought to identify the outstanding claims and, where he found them open to attack as invalid, to commence proceedings for their cancellation. He did so because he believed that

> The public interest dictates that the facts bearing upon [validity] should be ascertained and established when the evidence is available, and not postponed to await the day now apparently remote and unpredictable, when mining operations to extract oil shale have become economically practical and profitable, and rights under the leasing act would be invoked by persons wishing to avail themselves of its provisions, but when in all probability the question of whether a particular tract of land was within the purview of the act or within the exception of valid claims would be difficult to resolve correctly because of the obliteration or effacement of evidence by lapse of time, and spurious claims

> would have to be permitted to stand for lack of evidence to establish their invalidity. [*The Federal Shale Oil Co.*, 53 I.D. 213, 216.]

At first he proceeded on all grounds that might show the invalidity of claims—fraud, abandonment, and want of discovery as well as failure to perform the statutory assessment work. See, *e.g., Gabbs Exploration Co. v. Udall,* 315 F. 2d 37 (C.A.D.C.), certiorari denied, 375 U.S. 822. The manpower available for the task was limited, however, and when it became apparent that few were responding and that assessment work generally had not been done, he began a practice of limiting the investigations and charges to the assessment work issue. On the theory that the Act of 1920 would operate, of its own force, to withdraw claims from location as soon as assessment work was not done, he proceeded against any claim on which assessment work had ever lapsed, without regard to whether it had been resumed or whether any special government claim on the property had been made during the period of lapse.

As noted, few responded to the proceedings and fewer appealed adverse determinations, even within the administrative process. Some of respondents' predecessors were among those who failed of any response.[4] One of the persons against whom the Secre-

[4] Detailed histories of the titles and the assessment work contest proceedings regarding the claims in this case are set forth in Appendices B and C, respectively, to the government's trial brief. These appendices have been reprinted and are contained in the supplement to the government's brief in this Court. See, *e.g.*, 102–108, 109, 116, 122.

tary acted, however, one Emil Krushnic, appears to have been in active prosecution of his claims. Owning six claims, Mr. Krushnic and his partners had done over $600 assessment work each year, but in one year did that work in a manner which the Secretary believed could not be attributed to all the claims. The Secretary sought to cancel the "unworked" claim on this more-or-less technical basis, *Emil L. Krushnic*, 52 L.D. 295, and Krushnic sought relief in the courts. He succeeded in the lower courts, and when the government brought the case to this Court, it affirmed. *Wilbur* v. *Krushnic*, 280 U.S. 306. Under the mining laws as they existed prior to 1920, the Court reasoned, a failure to do assessment work would have been of no consequence so long as it was resumed before someone else actively asserted his interest in the land, as by relocation. At least in the absence of some affirmative action by the Secretary, it concluded, the Mineral Leasing Act did not establish a government "relocation" interest in the land, and so it remained possible for the claimant to reassert his interest in the land by resuming assessment work, as in fact Krushnic had done.

Krushnic was decided January 6, 1930. On January 27, 1930, the Department "overruled" its prior *Krushnic* holding in a pending case raising the same issue. *Standard Shales Prod. Co.*, 53 I.D. 42, 45; see also *Emil L. Krushnic, On Reconsideration*, 53 I.D. 45. On April 15, 1930, the President, by Executive Order under the Act of 1910, temporarily withdrew from lease or other disposal all deposits of oil shale and

lands containing such deposits owned by the United States, subject to valid existing rights. E.O. 5327; see 53 I.D. 127. And, in that year, the Department embarked on a massive campaign of examination and cancellation of the pre-1920 locations, including reconsideration of many of those which had been cancelled under *Krushnic*.[5] *E.g.*, 53 I.D. 131. In these new proceedings, the Department acted only where assessment work had lapsed and had not been resumed; in such cases, it entered the land, posted it, and informed the claimant that by reason of the default, the United States had taken possession. See *The Federal Shale Oil Co.*, 53 I.D. 213, 215. For the fiscal year ending June 30, 1931, 1,181 oil shale locations embracing approximately 140,540 acres were declared null and void in this manner; in the following year, 10,918 locations embracing 1,294,500 acres were voided; and in fiscal 1933, 11,146 locations embracing 1,448,980 acres were cancelled. (App. 78). It is apparent from the great volume of claims disposed of, and the trickle of administrative and judicial challenge, that the great majority of mining claimants must have defaulted, taking no action whatever to protect their

[5] The Secretary's annual report for 1930 stated (App. 70):

> Oil-shale lands, though having no immediate value for oil, have received vigorous protection. During the past year, commencing last spring, every mining engineer in the General Land Office, save three, was called off other work and under my personal orders assisted in identifying, examining, and physically posting more than 6,400 oil-shale claims with notice of default to the United States for failure of the claimant to perform assessment work. This followed the Supreme Court decision of *Wilbur* v. *Krushnic* * * *.

interest in what then appeared to be worthless property.[6]

Among the few who contested these proceedings were the claimants in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639. They alleged in a complaint which the government accepted as true for the purposes of the case that they had performed assessment work for every year through 1930; that there was then a fifteen-month lapse terminated by the government's action; that they stood ready to resume assessment work but were not permitted to do so; and that there had been neither relocation of their claims nor application to lease them during the period of assessment work lapse. In this Court, the government argued that now it had supplied the elements of non-resumption and challenge which had been missing in *Krushnic,* and that it was therefore appropriate to hold that the claims were not ones which had been "maintained" as the exception to the Leasing Act required. This Court acknowledged the Secretary's authority "to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment," 295 U.S. at 645, but appeared to conclude that a failure to do assessment work could be challenged only by relocation—an act, of course, impossible under the 1920 Act. A claim would be "maintained" within the statutory meaning, the Court reasoned, if there was

[6] For the history of the cancellation proceedings involving the claims in this case, see Appendix C to the government's trial brief, reprinted and contained in the supplement to the government's brief in this Court. See, *e.g.*, pp. 146–151.

a resumption of work; therefore, the allegations that the claimants there had arranged to resume work showed that they were maintaining their claim and that it was valid. At 646. The Court concluded that "the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law." At 647.

The Secretary promptly "overruled" the contrary administrative decisions, *The Shale Oil Co.,* 55 I.D. 287, vacated pending cancellation proceedings and, for a time, stood ready to reopen cancellations which had already been made final. But there was little immediate public response to this Court's action. At that time few claimants had any desire to resume working their claims; despite the massive record respondents sought to compile in the district court on the Secretary's alleged administrative practice of treating the cancellations as null and void, they were able to show only a handful of mining claimants who corresponded with the Department about their claims between 1935 and 1944. All told, only about 74,000 acres of the several million acres of claims cancelled have been reduced to patent in all the years since 1935 (App. 29). It seems clear that a major factor in this lull was a complete lack of interest in the oil shale claims which had been located for speculative purposes more than fifteen years before. That lack of interest included the claims involved in these cases. With one exception, no efforts were made by the original claimants or their successors to clarify their status from the time of cancellation to the proceedings out of which these appeals arose.

Since the President created the first Naval Oil Shale Reserve in 1916, the government and others have sought to put the oil shale lands to many other, conflicting uses.[7] In addition to the congressional establishment of a leasing system through the Mineral Leasing Act in 1920, all oil shale deposits have been withdrawn by Executive Order and reserved for investigation, examination and classification. E.O. 5327, *supra*. Executive Order 6016, issued February 6, 1933, authorized the issuance of oil and gas leases on oil shale lands. Such leases have been issued, for example, on 8,860 acres of the lands involved in this case, and applications are pending on an additional 5,280 acres (R. 7945–7948).[8] Proceedings have been instituted under the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. 527, to determine the rights as between the oil and gas lease claimants and the oil shale placer claimants (App. 371). Patents under the Homestead Act and other non-mineral land laws have been issued in 1,400 acres of these lands, pursuant to entries made subsequent to the alleged location of those claims (R. 7794–7839).[9] Much of the land, except that

[7] The uses, both as regards oil shale lands generally and the respondents' claims in particular, are shown in fuller detail in Appendices A and D to the government's trial court brief, reprinted in the supplement to the government's brief in this Court. *E.g.*, pp. 26–35; 175–181.

[8] References indicated by R. are to the full trial court record.

[9] The case of *Freeman* v. *Summers*, 52 L.D. 201 (1927), is a good illustration of this type of conflict. Exhibit S shows that the oil shale claims held by Freeman were subsequently declared invalid on an assessment work charge in 1931, that the homestead entry of Summers was reinstated as a result of the

patented under the non-mineral land laws, is used in support of livestock operations pursuant to the Taylor Grazing Act, 43 U.S.C. 315 (R. 7948–8463).[10]

RECENT DEVELOPMENTS

Since about 1949, there has been a revival of interest in oil shale, and there have been numerous attempts to assert the old, ostensibly cancelled oil shale locations in applications for patent. (App. 152–157). If the claims involved in this case are any indication, however, it is rare indeed that the applicant is a direct successor of an original locator rather than a speculator who in recent times and for small amounts of money purchased a partial interest in the locations and then proceeded to forfeit out other locators and their heirs. As shown in detail in Appendix B to the government's trial court brief, reprinted as part of the supplement to the government's brief in this Court, 100 of the 104 claims involved in the present litigations were the subject of such forfeiture proceedings. See, *e.g.,* Supp. pp. 51–52, 102–108.

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decision declaring the mining claims null and void and that in 1932, three years prior to the *Virginia-Colorado* decision, a patent was issued to Summers for his homestead.

[10] Physical actions have been taken in reliance upon those various types of interests. Thus, fences, reservoirs and other range improvements have been construed thereon in accordance with cooperative projects between the livestock operators and the Bureau of Land Management of the Department of the Interior; and reservoirs and other facilities used by the Bureau of Mines in connection with its experimental oil shale operation at Rifle, Colorado, have been constructed on part of the lands included within the claims here involved (R. 8550).

The history of the 48 "Bute" claims sold and leased to the Oil Shale Corporation for more than $1,500,000, is a typical example. These were located by nine individuals, of whom only eight were named on any one claim, on 7,680 acres of oil shale lands in December 1919 and January 1920.[11] (R. 2291–2316). The land records show an entry in February, 1921 (R. 2337), giving notice in lieu of assessment work, as a Joint Resolution of 1919 had permitted (41 Stat. 354). No other entries were made until 1954—although a person performing assessment work or claiming under a congressional suspension of the assessment work requirement is ordinarily required to record such work or claims. In 1954, one Tell Ertl recorded a quitclaim deed from a James Murphy, apparently one of the original locators (and upon whom service had been had when the claims were cancelled in 1931; see Supp. p. 113), conveying his 1/8 interest in 43 of the 48 claims for $100.00 (R. 2339, 7463). Later that year, Ertl recorded another such deed from a Steven A. Murphy, apparently another of the original locators (and upon whom service had been had, Supp. p 113), quitclaiming his 1/8 interest in 42 of the 48 claims, also for $100 (R. 2340, 7463). In July of 1955, Ertl then filed an Affidavit of Annual Labor, claiming to have done $100 assessment work on each of these (and other) claims (R. 2345–2349). A few days later, he began publication

[11] The information in this history is drawn from land record abstract entries and the answer to interrogatories of the Oil Shale Corporation, as shown in greater detail in the part of Appendix B to the government's trial court brief dealing with the Bute Claims, reprinted as part of the supplement to the government's brief in this Court (Supp. pp. 59–69).

of forfeiture notices in the weekly newspaper of the small town [12] of Grand Valley, Colorado, calling upon each of the original locators or their heirs to contribute their fair share of the assessment labor (R. 2363–2365). In an affidavit of January 13, 1956, he alleged that he had received no contributions in response to this publication (*ibid.*) and on May 7, 1956, a quiet title decree was issued by the District Court of Rio Blanco County, Colorado, finding Ertl to be the owner of all outstanding interests in the 48 Bute claims (R. 2368–2369). Through a complicated series of transactions [13] in the 1960's, interests in these claims were sold and leased to the Oil Shale Corporation at a price substantially in excess of $1,500,000 (R. 2377, 2412, 2410–2411, 2419, 2461–2471, 7461).

However they obtained their claims, three of the respondents applied to the Secretary to reduce them to patent. The Secretary rejected the applications on the ground that while his predecessor may have erred in cancelling the claims in the late 1920's and early 1930's for failure to do assessment work, he did have jurisdiction over the subject matter and his acts therefore were not void. The Secretary recognized that he

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[12] The 1956 Rand McNally Commercial Atlas and Marketing Guide gives the population as 296.

[13] The transactions were complicated by the fact that one H. A. Dutton, Jr. had been engaging in similar operations after having secured a quitclaim deed from one who may have been one of the heirs of one of the original locators (R. 2355, 2378–2380). Although Dutton seems not to have responded to the quiet title proceedings, there appears to have been some accommodation to his "interest."

could revive the cancelled claims in the exercise of his supervisory authority, but, after the many years of asquiescence, declined to do so. He stated (*Union Oil Company of California, et al.* 71 I.D. 169, 177; App. 362): "the decision nullifying the claim will be treated as conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration."

The fourth respondent, the Oil Shale Corporation, did not apply to the Secretary but sought a declaratory judgment in the United States District Court for the District of Colorado that the Secretary was without right in subsequent patent proceedings to assign any weight to the cancellations of the 1920's and '30's. The case was consolidated with the three challenges to the administrative action, and the district court found, contrary to the Secretary, that the cancellations could not be relied upon (App. 46–47).

The court of appeals affirmed on the ground that this Court's decision in *Virginia-Colorado, supra*, "must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it [sic] did, and to so cancel the claims. This in the administrative area must be taken to mean his actions were void and of no legal effect" (App. 442).

SUMMARY OF ARGUMENT

I

This Court has affirmed in sweeping terms the Secretary's subject-matter jurisdiction to determine

statutory rights of individuals in the public domain. "[S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void." *Cameron* v. *United States,* 252 U.S. 450, 460. "[T]he Department has been granted plenary authority over the administration of public lands, including mineral lands * * *." *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336. Although disputes over the validity of mining locations are generally heard in state courts, that is only because generally the federal government has no occasion to question them before applications for patent is made; *Humboldt Mining* makes plain that the Secretary has power to resolve a validity issue before patent where there is reason to do so. It is clear that such reasons existed in the unusual circumstances which led the Secretary to initiate the challenged cancellation proceedings during the 1920's and 1930's.

Nothing this Court said or did in *Wilbur* v. *Krushnic,* 280 U.S. 306, or *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U.S. 639, compels the conclusion that the Secretary lacked subject-matter jurisdiction to challenge mineral locations on land which the government wished to withdraw for its own purposes, where the locators had failed to perform the statutorily required assessment work. On the peculiar facts of *Krushnic,* the Court had to determine only that no withdrawal had taken place before assessment work on the challenged claim had been resumed; it care-

fully reserved for later decision the question whether a mining location could be canceled during a period of assessment work lapse and in response to a specific assertion by the government of its interest in the land. The right of the government to withdraw under such circumstances had often been declared in administrative proceedings involving the creation of Indian and military reservations, irrigation projects, and national parks out of the public domain. In *Virginia-Colorado*, it was necessary to decide only that the claimants there "maintained" their claim within the meaning of the statute when they respondsd to the Secretary's challenge with a declaration of readiness promptly to resume the performance of assessment work. But those who permitted the Secretary's action to become final did *not* respond to the Secretary's challenge, and thus did not "maintain" their claims even to the slight extent the Court found sufficient; the Court's opinion suggests no purpose or occasion to rule that the cancellations made in those cases were without legal force.

The provision of the statute requiring locators to "maintain" their claims in the manner provided by law required interpretation. The Secretary had subject matter jurisdiction to construe the statute, and authority to initiate administrative proceedings testing the validity of claims in advance of application for patent. That he may have erred in interpreting the maintenance requirement as he did, and thus in bringing pre-patent proceedings based upon that construction, does not undercut his authority, and hence

affords no occasion for collateral attack. The contrary conclusion would render administrative proceedings in general uncertain, and would have untoward consequences for the public domain.

II

It was well established at the time the Mineral Leasing Act of 1920 was passed that although in general the government had no interest in the validity *vel non* of mining locations prior to patent, it did have such an interest where, acting as if it were a relocator, it wished to withdraw the lands to a different public use—for example, a military or Indian reservation, irrigation works, or a national park. In such cases, lands subject to location at the time of withdrawal either were permanently excluded from the scope of the federal project, or were taken into it reserving the existing location right *so long as it was maintained.* In the case of exclusion, the lands remained subject to the mining laws, and other prospectors could relocate them if the original locator ceased his assessment work; in the case of incorporation, the government could claim the lands if that work was not done. No one ever suggested that locations might be immunized both from relocation and from government withdrawal in the event of assessment work lapse. Since the Leasing Act withdrew the lands from relocation and specifically required that existing locations be "maintained," the lands here were subject to withdrawal by the government when assessment work lapsed. If, as this Court held in *Krushnic,* the

1920 Act did not itself work such a withdrawal, all necessary steps were taken by the 1930's, when oil shale lands were withdrawn even from leasing by Executive Order and the Secretary caused each of the challenged claims to be posted by the government during a period of lapse in assessment work.

Indeed, both the legislative history and the form of the Leasing Act make plain that Congress contemplated diligent working of existing claims in order to preserve them under that Act. The legislative history shows that all the debates about continuing to recognize prior claims centered on the claims of persons drilling for oil but who had not yet discovered it; the plight of such persons, who often invested substantial amounts of money in the search, had occupied the Congress' attention since 1909, when the President first withdrew oil lands from location under the Mining Act. Although such persons were thought to be entitled to continue drilling after an intervening withdrawal, albeit they had not yet discovered oil, there was general agreement that they should be diligent in doing so. No one expressed the view that a person with a location valid in 1920 should be permitted to sit on it for 10, 20, or 50 years, using it for no other economic purpose than the occasional grazing of livestock. That question did not arise because oil shale was not introduced into the proposed coverage of the Act until 1918—four years after debates over mineral leasing bills began; regarding the preservation of rights in oil shale claims, the legislative history remarks principally that the locator "may, upon re-

linquishing his claim, be entitled to a lease." H. Rep. No. 563, 65th Cong., 2d Sess. 18 (1918).

The "lease" spoken of refers to an alternative to the requirement of maintenance offered oil shale claimants who had located their claims before 1919—that is, at an early, pre-"land rush" stage. It was known at the time that oil shale was without current commercial use, as it is today, and would require extensive technological development for its exploitation, as it still does. A lease offered the advantage of a five-year hiatus in financial obligations, to "encourag[e] the production of petroleum products from shales." 41 Stat. 446. That respite would be valuable only if a claim would otherwise have to be worked. It is incomprehensible that Congress would have permitted only five years of unproductive landholding under the lease but—by withdrawing the possibility of relocation yet providing no means for government enforcement of the assessment work requirement—would have permitted (to date) fifty years of unproductive landholding under the existing locations. This Court erred in depriving the government of the enforcement mechanism for assessment work which the Secretary had earlier established in withdrawal cases.

371-067—69——3

ARGUMENT

I. THE SECRETARY HAD SUBJECT-MATTER JURISDICTION OVER THE CANCELLED CLAIMS, AND THEREFORE IS NOT FORBIDDEN FROM GIVING EFFECT TO CANCELLATIONS WHICH BECAME FINAL PRIOR TO THIS COURT'S DECISION IN ICKES V. VIRGINIA-COLORADO DEVELOPMENT CORP.

The principal ground of decision in the court of appeals was that the cancellations involved in this case were void, and hence subject to collateral attack, under this Court's holding in *Virginia-Colorado* that such cancellations "went beyond the authority conferred by law." 295 U.S. at 647. This reading is in conflict with the decisions of this Court on the scope of the Secretary's jurisdiction to decide questions involving the public lands, and if permitted to stand would seriously encumber his administration of those lands.

In general, administrative decisional action is a legal nullity, and thus subject to being ignored or to collateral attack, only in circumstances in which judicial action would similarly be void—*e.g.* defect of process, fraud in the proceedings, or the absence of power in the agency to consider the question put. *Cameron* v. *United States,* 252 U.S. 450, 459–460; *Callanan Road Co.* v. *United States,* 345 U.S. 507, 512; Davis, *Administrative Law Treatise,* sec. 18.10 (1958 ed.). In the present case, the asserted defect is in regard to the

last of these, subject matter jurisdiction.[14] Accordingly, we examine that question.

A. THE SECRETARY HAS SUBJECT-MATTER JURISDICTION OVER CLAIMS TO POSSESSORY RIGHTS OVER LANDS AS TO WHICH TITLE REMAINS IN THE FEDERAL GOVERNMENT.

As a general proposition, there could be no doubt that the Secretary of the Interior has subject matter jurisdiction to determine the existence of statutory rights accorded individuals to secure the transfer of rights and title to the public domain from public to private ownership. This Court has consistently held that the Department of the Interior has an all-inclusive subject-matter jurisdiction to determine the validity of mining claims (like all other claims to statutory rights in the public domain). *United States* v. *Schurz*,

[14] Regarding the question of notice, the Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of California*, 72 I.D. 313. It does not follow, however, that respondents are entitled to partial rights to each of the contested locations. If they obtained the rights of unserved persons through forfeiture proceedings based on quitclaim deeds obtained from persons who *had* been served, p. 20, [redacted] and the cancellations as to persons served are valid, it appears that respondents gained nothing. That is, the rights of unserved persons can be obtained only directly, and not through forfeitures based on a cancelled claim.

Moreover, if the Court accepts our second proposition, that *Virginia-Colorado* was in error and should be overruled, the Secretary would be able to require any applicants for patents to show that they had been doing assessment work at the time the lands were posted and withdrawn in the 1930's, whether or not personal service could be established.

102 U.S. 378, 395–396; *Bishop of Nesqually* v. *Gibbon,* 158 U.S. 155, 167; *Michigan Land and Lumber Co.* v. *Rust,* 168 U.S. 589, 593; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324–325; *Cameron* v. *United States,* 252 U.S. 450; *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 335. It is necessary to discuss only the last two cases cited, each of which involved questions relating to the subject-matter jurisdiction of the Secretary of the Interior to determine the validity of mining claims.

In *Cameron,* this Court rejected a challenge to the authority of the Secretary to pass on the validity of mining claims and commented upon his power in sweeping language (252 U.S. at 459–460):

> The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. We say "naked proposition" because it is not objected that Cameron did not have a full and fair hearing, or that any fraud was practised against him, but only that the Secretary was without any power of decision in the matter. In our opinion the proposition is not tenable.
>
> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exer-

> cised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; *United States* v. *Schurz,* 102 U.S. 378; *Lee* v. *Johnson,* 116 U.S. 48, 52; *Knight* v. *United States Land Association,* 142 U.S. 161, 177, 181; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316.
>
> * * * [S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * *

Humboldt Mining reaffirmed this broad statement of the Secretary's authority. That was a case in which the government sought to condemn land which included an existing mining claim, which the claimant had never sought to reduce to patent. Over the claimant's objection, the condemnation court referred the issue of the validity of the claim—there challenged for want of discovery—to the Department of the Interior. If the claim was valid, the government would have to pay just compensation; if not, it was under no such obligation. This Court upheld the reference thus made:

> We deal here with a unique form of property. A mining claim on public lands is a possessory interest in land that is "mineral in character" and as respects which discovery "within the limits of the claim" has been made. *Cameron* v. *United States,* 252 U.S. 450, 456. The discovery must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with

> a reasonable prospect of success, in developing a valuable mine." * * *
>
> Respondents' mining claims are unpatented, the title to the lands in controversy still being in the United States. The claims are, however, valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met. *Cameron* v. *United States, supra.* The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them. [371 U.S. at 335–336.]

It is thus established that the Secretary's subject-matter jurisdiction over disputes concerning the validity of mining claims on the public domain is not limited to those which come before him in the course of an application for patent.

Respondent's argument to the contrary will undoubtedly start with the proposition that, nonetheless, disputes over the validity of locations as distinct from patent claims are generally heard in state courts rather than the Department, and that in particular the Department has not otherwise claimed jurisdiction to enforce the assessment work requirement of the Mining Act. But neither proposition has ever been entirely true.

Humboldt Mining itself is one example of a situation in which the Department was properly called upon to resolve an issue of validity before patent. And, as we show in greater detail within, pp. 50–56, while the government in general has not undertaken to enforce assessment work requirements, that is because in general it has had no competing use to which it wished to put the land involved. In the absence of such uses it has relied on the possibility of relocation by other prospectors to encourage the work towards development of the nation's mineral resources which the Mining Act as a whole was meant to promote. Where there *was* a competing use for which the government wished to reserve the land—for example, a national park—the Department has asserted its jurisdiction to adjudicate the performance *vel non* of assessment work, and declared locations invalid where that work was not being done. See, *e.g., E. C. Kinney,* 44 L.D. 580, 582; *Interstate Oil Corp. et al.,* 50 L.D. 262; *Standard Shales Prod. Co.,* 52 L.D. 522; *Hodgson* v. *Midwest Oil Co.,* 17 F. 2d 71 (C.A. 8); 1 Lindley, *Mines* (3d ed. 1914), pp. 398–399. This line of authority was developed at some length in the government's brief in *Wilbur* v. *Krushnic, supra* (No. 63, O.T. 1929, pp. 18–30), and the exposition there no doubt explains why that Court so carefully reserved decision whether some form of challenge on behalf of the United States *during a period of assessment work lapse* would be effective to invalidate a claim. 280 U.S. at 318.

Wilbur v. *Krushnic* does not suggest that the Court believed that problems of subject matter jurisdiction were raised in that case. The case arose in factual circumstances entirely favorable to the claimant. He and others owned six claims and had done over $600 assessment work in every year, including years after that in issue; he applied for a patent in 1922, only two years after the Leasing Act had gone into effect, and would have received it but for an administrative determination that the assessment work done on other claims in one year was not attributable to the claim for which he sought patent. Since the cases on which the government relied in supporting this rather harsh result involved situations where assessment work had entirely lapsed and had not been resumed (*de facto* abandonment) and where the government's interest in the land was rather specifically asserted (quasi-relocation), it is not surprising that the Court declined to interpret the Leasing Act as the government sought—that is, as automatically returning to the government full possessory right to any land subject to oil shale claims once assessment work had lapsed, however technically, for as much as a year and without regard to whether it had been resumed before adverse proceedings were begun. But in reserving the *Virginia-Colorado* question for later decision, the Court gave no hint it thought it would be inappropriate for the Secretary to decide it. It ruled not that it had been wrong for the Secretary to construe the meaning of the 1920

Act, but only that he had construed it erroneously.[15]

Indeed, since it is the Secretary who has the responsibility of administering the public lands, including those affected by the Mineral Leasing Act, it would appear unassailable that the Secretary had the authority to construe the statute and to apply it in accordance with his construction unless and until he was corrected by the courts. *West* v. *Standard Oil Co.*, 278 U.S. 200, 218–220; *Work* v. *Braffet*, 276 U.S. 560, 566. The statute provides that deposits of oil shale on public lands may be disposed of *only* by lease except as to claims which were valid on February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated." Necessarily, the Secretary was permitted to decide what constituted the maintenance called for. As this Court said in *United States* v. *Williams*, 341 U.S. 58, 66:

> "Jurisdiction is the power to decide a justiciable controversy, and includes *questions of law as well as of fact.*" *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 305. Even the uncon-

[15] Nor does the grant of mandamus relief in *Krushnic* carry with it the implication that the Court felt the Secretary had overstepped his jurisdiction in considering what the 1920 Act's maintenance provision meant in regard to the assessment work requirement. *Krushnic* arose out of an application for patent, and it was apparent that if the Secretary had been wrong, he should reconsider the patent application under the correct construction of the statute. Having itself decided how the statute should be construed, the Court was satisfied that the Secretary had no remaining discretion to treat the patent application otherwise. In those days, before other modes of administrative review became familiar, mandamus was an appropriate means of assuring that the Secretary would respect the Court's construction. Cf. *Payne* v. *Central Pac. Ry. Co.*, 255 U.S. 228, 238.

> stitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction. *Chicot County District* v. *Baxter State Bank,* 308 U.S. 371, 376. See also *Stoll* v. *Gottlieb,* 305 U.S. 165; *M'Cormick* v. *Sullivant,* 10 Wheat. 192.

See also *Butte, A. & P. Ry.* v. *United States,* 290 U.S. 127; *Swift & Co.* v. *United States,* 276 U.S. 311, 331. Even if there might be some occasions when a construction strays so far from statutory meaning that it can be said to lack even the color of authority, that is not this case. The Secretary was concerned with the meaning of maintenance, not some extraneous matter, and, as we show within, there was ample statutory and administrative history, as well as an important policy basis, to support the conclusion he reached.

Finally, if the Secretary had jurisdiction to decide what the statutory requirement of maintenance required, he had the authority to determine that issue and apply his construction in advance of applications for patent. This Court has already approved such procedures in *Humboldt Mining, supra.* While that is a recent case, *Cameron* v. *United States, supra,* points in the same direction. In that case, Cameron had applied for a patent on certain lands under the Mining Act which, if not validly claimed, had been withdrawn for use in the Grand Canyon National Monument. The Secretary refused the patent, on the ground that no valuable mineral had been discovered, *and then went on to hold the mining locations on which the patent claims had been premised invalid as well.* 252 U.S. at 457–458. On the basis of this latter hold-

ing, not the refusal to patent, the land was recovered for use in the Monument and the government secured injunctive relief against Cameron's further interference with the land; it was the Secretary's jurisdiction to void the location, not to refuse to patent, which this Court upheld in the sweeping language quoted above.[16] See also *Clipper Mining Co.* v. *Eli Mining and Land Co.*, 194 U.S. 220, 223; *Gabbs Exploration Co.* v. *Udall*, 315 F. 2d 37 (C.A.D.C.), certiorari denied, 375 U.S. 822; *E. C. Kinney, supra; Navajo Indian Reservation*, 30 L.D. 515; *Arid Land, etc.*, 32 L.D. 387.

The Secretary's forceful remarks in *The Federal Oil Shale Co.*, 53 I.D. 213, 216, make clear why prepatent proceedings were required in the particular case of oil shale:

> The public interest dictates that the facts bearing upon [validity] should be ascertained and established when the evidence is available, and not postponed to await the day now apparently remote and unpredictable, when mining operations to extract oil shale have become economically practical and profitable, and rights under the leasing act would be invoked by persons wishing to avail themselves of its provisions, but when in all probability the question of whether a particular tract of land was within

[16] This further holding may be treated as an adjudication prior to patent, because the denial of a patent does not necessarily invalidate the location on which it is based—for example, if it is found that less than the required $500 development work has been done. Cameron in fact made a subsequent patent application based upon these asserted locations. 252 U.S. at 458.

> the purview of the act or within the exception of valid claims would be difficult to resolve correctly because of the obliteration or effacement of evidence by lapse of time, and spurious claims would have to be permitted to stand for lack of evidence to establish their invalidity.

If the necessary impetus to such proceedings was not supplied by the Leasing Act itself, it was certainly present by 1930, when experience had proved that most oil shale claims were in fact abandoned, the challenged claims were individually posted, and the President by Executive Order withdrew all oil shale lands even from leasing. There was then a specific, competing government use.

B. THIS COURT'S DECISION IN VIRGINIA-COLORADO DID NOT REST ON SUBJECT-MATTER JURISDICTION, OR PURPORT TO DECIDE THAT THE THOUSANDS OF DECISIONS THE SECRETARY HAD MADE WERE OF NO EFFECT EVEN IF FINAL.

In *Virginia-Colorado,* this Court again faced facts which were not typical of the usual case in which challenges based on failure to do assessment work had been brought. The claimants had done assessment work for ten years under the Leasing Act before they stopped, and responded promptly to the Secretary's challenge to their location with an offer to resume it. This Court construed the maintenance requirement of the Mineral Leasing Act as requiring no more than a resumption of work. The *Virginia-Colorado* claimants, it concluded, were entitled to resume, had made arrangements to resume, and would have resumed their develop-

ment work had the government not interfered. 295 U.S. at 646. Those facts were sufficient to maintain that claim.

The facts shown by the title histories and assessment work contest proceedings of the locations involved in this case—summarized at pp. 102–108 and 146–151 of the supplement to our brief here—are more usual: assessment work which stopped in the early 1920's and which was never resumed until a speculator bought quitclaim deeds to a few of the original locators' interests in the 1950's. In most cases, as in most of these cases, not even a feeble response was heard to the Secretary's challenge—there was no effort to maintain, to resume work. Of course, if the Secretary's actions were void, without even color of authority, there was no need to respond, to resume work, or at least to declare one's readiness to do so. But that conclusion would have deprived the maintenance requirement of any meaning at all, and we cannot believe it is what this Court meant to do.

The proceedings of the 1930's were a dragnet operation, and the resumption-of-work rationale would protect those conscientious claim-holders who were caught up for more-or-less technical flaws and then resisted the dragnet's effect; unless associated with the conclusion that the Secretary's action was void, however, that rationale does not aid those who had permitted the Secretary's action to become final. And the Court's opinion does not suggest a purpose to resurrect those cancelled claims.

The support for the voidness contention is the final sentence of the opinion:

> We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. [295 U.S. at 647; App. 442.]

But we cannot view this statement as necessarily embodying more than that the Secretary's error in construing the maintenance provision subjected that cancellation proceeding, and the complaint which initiated it, to dismissal for failure to state a cause of action. Such a failure in any adjudicated controversy, whether heard judicially or administratively, is no ground to set the decision aside as void after it has become final. Cf. *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 561; *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 318 (C.A. 8); Moore, *Federal Practice* (2d ed. 1968) par. 60.25[2]; Boskey and Braucher, *Jurisdiction and Collateral Attack*, 40 Col. L. Rev. 1006, 1013.

The Secretary has subject matter jurisdiction to construe the statute and to initiate proceedings to test the validity of locations under his construction. As Chief Justice Hughes, the author of *Virginia-Colorado*, remarked in a later, landmark case, there was "full opportunity to present any objections to the proceeding, not only as to its regularity * * * but also as to the validity of the [interpretation] under which the proceeding was brought * * *." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 375. Respondents and their predecessors, "having the opportunity to raise the question of invalidity, were not the less

bound by the decree because they failed to raise it." *Ibid.* In *Virginia-Colorado,* this Court had neither occasion nor reason to decide the contrary.

C. A CONCLUSION NOW THAT THE SECRETARY'S ACTIONS IN THE 1930'S WERE VOID AND WITHOUT ANY RECOGNIZABLE EFFECT WOULD HAVE UNTOWARD CONSEQUENCES FOR THE PUBLIC DOMAIN.

The same practical considerations of need for finality in the administration of justice which limit the circumstances in which judicial actions will be found to have been void also apply in the administrative setting. If it is decided that courts have been applying an erroneous principle of law in a class of cases, it would nonetheless be chaotic to declare that all prior decisions based on that principle, however final, are thereby deprived of effect. *Chicot County Drainage District, supra,* 308 U.S. at 374–375. Indeed, even in criminal cases involving ongoing deprivations of personal liberty and matters of constitutional principle, the need for finality often prevails in determining whether judgments based on erroneous principle shall be subject to collateral attack. *E.g., Tehan* v. *Shott,* 382 U.S. 406. When administrative agencies err in applying the governing law, their action is frequently characterized in such terms as "beyond the authority conferred by law," 295 U.S. at 647; if on each such occasion all prior, final decisions resting on the same error were thereby nullified, agencies would be subjected to a far heavier burden of litigation, and the certainty of their adjudications would be substantially compromised.

In the particular case of the Secretary of the Interior, that burden would be insupportable. He is entrusted with management of the entire public domain. This Court noted the magnitude of that operation in *Humboldt Mining Co.*, 371 U.S. at 339 n. 8, and *Boesche* v. *Udall*, 373 U.S. 472, 484 n. 13: during fiscal 1961, 27,228 mining claim adjudications were closed, and at the outset of that year, 159,000 mineral leases covering 125,000,000 acres of public domain were outstanding, requiring his supervision under the Mineral Leasing Act. In view of these responsibilities, and others like them, it is manifest that the Secretary must be able to rely on his records of action taken affecting the land under his control, where those actions are not directly challenged by the individuals concerned. If legal error in a determination serves to render all prior, similar determinations void, this certainty—always thought particularly essential in the context of transactions affecting land—will be unattainable.

It is clear, moreover, that the cancellations of the 1920's and 1930's—although they may have been erroneously based—served the basic public policy of clearing public lands of abandoned claims to facilitate their use in the public interest. The Secretary moved to promote those uses. Under the Mineral Leasing Act, all the lands were reserved for disposition under a leasing system providing for rentals, royalties, and continuing supervision for the benefit of the public

as a whole.[17] Indeed, oil and gas leases have been issued on 8,860 acres of the lands involved in this case, and applications for leases are pending on an additional 5,280 acres (R. 7945–7948). Other of these lands have been withdrawn by Presidential order and placed in national reserves under the administration of the Department of the Navy (R. 7683–7693). Patents have been issued on 1400 acres of these lands under nonmineral land laws since the alleged location of these claims (R. 7794–7839). Bureau of Mines facilities have been constructed on part of the land here involved, in connection with the experimental oil shale operation at Rifle, Colorado (R. 8550). Almost all of the land is in use as grazing land under the Taylor Grazing Act, 43 U.S.C. 315, and fences, reservoirs, and other range improvements have been constructed to support these operations (R. 7948–8463). If the present holders of the old cancelled claims are able to qualify for patents, they would receive title to the land and be able completely to disrupt this program of use.

It does not follow from the decisions below that respondents are entitled to patents, since the claims remain subject to challenge, *inter alia,* for lack of

[17] Under Executive Order No. 5327, all oil shale deposits were withdrawn from leasing April 15, 1930 and reserved for investigation, examination and classification. Oil and gas leases on these lands were authorized February 6, 1933 by Executive Order No. 6016, and all the leases described in the following text have been issued since that day.

discovery and abandonment. If these issues must be resolved on a case-by-case basis, however, as they presumably would have to be if the prior cancellations cannot be relied upon, the Secretary will be faced with an intolerable burden. There are at least 30,000 claims, most of them involving eight locators when made fifty or more years ago. To clear the title to the oil shale lands might require a diligent search for all their successors-in-interest. To the cost of this search must be added that of litigation. One recent test case on the issue of discovery involved 39 hearing days, a 5,248 page transcript and approximately 2,000 exhibits. Plainly the monetary and administrative costs of contesting the cancelled claims today would be staggering. Anticipation of that cost was, indeed, the principal reason why the proceedings of the 1920's and 1930's were brought at that time. *The Federal Oil Shale Co., supra.*

Moreover, a conclusion that the former proceedings were void—not just erroneously brought—would impede the present resolution of claims to patent or location even in cases where no adverse decision was then made, or if made was void for another reason such as failure of service. It was notorious at the time that the Secretary was undertaking these proceedings to challenge the locations which had been made. If there were a color of authority to his actions, it would be appropriate to conclude that persons who made no effort to protect their locations by responding to service, or by performing assessment work during

the period of challenge, or by resuming it however briefly after *Virginia-Colorado,* had in fact abandoned those claims and thus could not assert them now even if formally entitled to. If the Secretary's actions were without color of authority, however, there would have been no obligation to respond to them and consequently it could be argued that no inference could be drawn from the failure to respond. As it is, respondents are able to argue that no inference can be drawn from their or their predecessors' failure to develop their claims after *Virginia-Colorado,* because this Court there held that all that was required of them was a readiness to resume such work. If the government cannot rely on the pre-1935 history of disregard for these claims, it may be hard-put to resist the basically speculative applications for public lands now being made,[18] and to administer those lands in a rational fashion.[19]

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[18] For example, it would seem patent that, given their history of disuse and non-development, oil shale lands could not meet this Court's clear definition of the "discovery" requirement of federal mining laws in, *e.g.*, *Humboldt Mining*, 371 U.S. at 335–336:

> The discovery must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." * * *

But relying on *Virginia-Colorado*, and a policy adopted by the Department in the first flush of excitement over oil shale (see App. 105–110), respondents can be expected to argue that the oil shale was a discovery when made, and that this Court's interpretation of the maintenance requirement renders failure to make further expenditures of labor irrelevant to the discovery issue as well.

[19] The administrative problem of issuing leases for oil shale, oil, sodium and other leasable minerals, in areas which had

II. THE GOVERNMENT IS ENTITLED TO WITHDRAW FROM LOCATION LANDS WHICH IT REQUIRES FOR PUBLIC PURPOSES AND UPON WHICH THE ASSESSMENT WORK REQUIRED BY STATUTE IS NOT BEING DONE

The preceding argument rests on the premise that *Virginia-Colorado* is good law as to the substantive

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previously been cluttered with speculative but undeveloped and unmaintained mining claims, is obvious. If a worthless claim is not terminated by adjudication, it is always capable of arising from its own ashes to harass lessees of the United States. In fact, it was the existence of this problem which gave rise to adoption of the Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. 521 ff., under which mining claimants must assert their interests or lose any right to leasable minerals. The interests, if asserted and valid, would prevail, however.

The hearings on this bill are filled with references to the problem created by the fact that there is no automatic termination of unused and undeveloped mining claims. We quote, in particular, the following from the Hearings, H. Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, H.R. 8892 and H.R. 8896, 83d Cong., 2d Sess., p. 31 (1954):

> Mr. DAWSON. In other words, it is sort of a blackmail proposition.
>
> The mining man who has an old claim located, let us say, back in 1918 and has never done anything with it, now comes along and finds you have got a million dollar oil well on there, and therefore he is going to assert the old claim to make you pay off.
>
> * * * * *
>
> Mr. ENGLE. Will you yield for a minute? I think what the gentleman does not understand is this: That after somebody slaps a mining claim on a piece of public land, the mining claim, in the absence of some dispute thereof, continues and has validity. They can file in 1918 and not do a lick of work and not turn a shovel, and there it sits. And unless somebody comes along now with an adversary

issue there decided—whether the Mineral Leasing Act of 1920 entitled the Secretary to enter, post, and withdraw from existing locations public lands on which the assessment work required by the Mining Act of 1872 was not being done. We suggest there that the Court's interpretation of the word "maintained" appearing in the 1920 statute might be read as requiring at least a demonstrated willingness to resume performance of assessment work upon government demand and concede that, if so read, it would not deprive the provision of all meaning. But that reading is somewhat tortuous, and this Court may disagree with our conclusion that these respondents are not entitled now to challenge, in collateral proceedings,[20] the cancellations of years ago. Moreover, although the decision in *Virginia-Colorado* was unanimous, our review of the government's brief in that case convinces us that there

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proceeding against it, asserted by other claimants, not by the Interior Department necessarily, it is not disturbed. So they have these mining claims scattered around like shinplasters all over the public domain, and no one has done anything about them.

What the witness is saying is that somebody wakes up to the fact that the land has become valuable because of other things, and then some sharpster starts looking up the relatives of old Uncle Joe Jones who staked that claim out. They know about it. He has a sister out in Los Angeles and so they go out and run her down. She is dead and her two kids are around there, and they find them, and they get a quitclaim deed from them. Then they go marching back to the fellow who has dug the well and says, "Mr., just pay off or we will start moving in on this claim. We have a bulldozer right out here now."

[20] In district court and the court of appeals, they also asserted a right of direct review.

were numerous matters that were not, but should have been, brought to this Court's attention at that time. Thus, not without hesitation, we suggest that *Virginia-Colorado* should be limited to its own facts, which were somewhat special, and, if necessary, that it should be overruled. For the passing of thirty years—obscuring the identity of those who initially located these claims and opening the possibility of sharp practice and uncertainty of right in the public domain—has raised serious doubt about the validity of that ruling.

A. CONTRARY TO THE COURT'S CONCLUSION IN *VIRGINIA-COLORADO*, AND AS HAD BEEN SHOWN IN THE GOVERNMENT'S *KRUSHNIC* BRIEF, IT WAS ESTABLISHED LAW THAT THE GOVERNMENT COULD INVALIDATE MINING LOCATIONS BY WITHDRAWING TO A PUBLIC USE LAND SUBJECT TO SUCH LOCATIONS IF THE REQUIRED ASSESSMENT WORK WAS NOT BEING DONE.

This Court's decision in *Virginia-Colorado* was based upon the assumption that prior to the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, a mining claim could not be challenged by the United States under any circumstances for reason of failure to do the required annual labor.[21] Indeed, in its brief in

[21] Respondents may argue that this Court's decision in *Wilbur* v. *Krushnic* is subject to the same interpretation. Were that the case, we would have to urge that that decision, too, be reexamined. But in light of the special facts of that case, and the careful reservation of the *Virginia-Colorado* question in the Court's opinion, we view it as holding only that the 1920 Act had not by itself worked the necessary withdrawal of land from location, and that at the least some affirmative government action to withdraw the lands during a period of assessment work lapse was called for. Whether or not such a holding is also questionable, it imposes no substantial burden on the development or administration of public lands.

Virginia-Colorado, the Department of Justice apparently assumed the same thing. Although its brief in *Krushnic* had extensively developed contrary authorities, pp. 18–30, in *Virginia-Colorado* the government stated:

> The only requirement for the maintenance of a claim under the old mining law, once the claim had been perfected, was the requirement in Section 2324 of the Revised Statutes (*infra,* p. 22) as to the performance of annual assessment work. That requirement constituted a condition subsequent to the right of exclusive possession granted by the United States to the locator. Failure to comply with the condition opened the claim to relocation by another. It did not, however, result in forfeiture of the claim as against the Government, for the Government had no direct interest in the matter, being concerned only with seeing that its mineral-bearing lands were kept open for private exploitation. [Br. p. 6.]

The only question briefed was whether the Mineral Leasing Act changed the existing law and thereafter required annual assessment work to avoid forfeiture, because the land had been withdrawn from relocation.

The assumption was erroneous. This Court pointed out in *Humboldt Mining, supra,* 371 U.S. at 335, that a mining location is "a unique form of property"—simply a right to possession, creating no rights in the absence of valid discovery, granted only to spur the mining and production of the nation's mineral wealth, and remaining impressed on the land as a cloud on title until dislodged by a contest proceeding, even

though worthless or abandoned. But a mining location is not so unique that it can never be dislodged by the government, however pressing the government's purposes and for however long the claimant has failed to do the required assessment work.

In the early history of the public domain, the United States had no established mining laws. Many of the early claims were staked only pursuant to local miners' rules. They were made on publicly owned lands by virtue of a presumed right. The presumption was correct enough, for originally the United States did wish to encourage development of its mineral riches solely through private exploration and prospecting. This policy was formalized in the Mining Acts of 1866, 14 Stat. 86, and 1872, 17 Stat. 91, 30 U.S.C. 21 ff.

These Acts indicate a complete willingness to permit a prospector to roam the public domain, to establish a claim by location and discovery, to work that claim as long as might be desired and to obtain a patent covering the entire fee upon making certain proofs. Unless claims are advanced to patent, the mining laws did not contemplate that the United States, the Department of the Interior or any other department be given even the basic information that a claim had been located. In fact, the original mining laws displayed a great indifference regarding what particular individuals were staking claims or removing minerals from the vast, difficult terrain that constituted the ordinary mineral areas of the public domain. Disputes between rival locators were left for

settlement on the basis of locally adopted rules in mining districts. Locations were required to be recorded in local county offices for the apparent purpose of permitting a locator to establish priority over later arriving prospectors. The assessment work requirements were imposed to spur development, by assuring that valuable claims could not be sequestered by a person unwilling to work them. But the majority of mining claims were located, fought over and made the basis of production without making the United States, the owner of the land, aware of their existence. It was only when a claimant desired a patent that an entry (the notation of the patent application) was made in the records of a government land office.

In effect, it can be said, then, that in the early days when vast areas were available and the Government's use of its own public lands was minimal no attention was paid to whether mining claims had been located, whether they were valid or whether they had been abandoned. Moreover, even though the law contemplated that mining claims would be worked to produce minerals, and provided for relocation to that end, it contained no specific provision for their termination as a cloud on title when the high hopes faded, the tin can markers rusted, and the claims returned to their primeval solitude.

This indifference changed, however, around the turn of the century. With the growing interest in use of the public lands and mining areas for other purposes, the Government, of necessity, became interested in the validity or nonvalidity of both old and new min-

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ing claims in such areas. In national forest lands, many mining claims had been made before the withdrawals. Withdrawals for Indian and military reservations, national parks and national monuments included areas dotted with mining claims. The use and patenting of these claims, if valid, was always permitted after the withdrawals. But invalid claims constituted only roadblocks in the administration of the public property.

As early as 1881, in an opinion with respect to lands withdrawn for the Fort Maginnis Military Reservation, the Attorney General clearly indicated that the possessory right attaching to a mining claim within an area subsequently withdrawn is valid against the Government only so long as it is maintained, including the performance of annual assessment work (1 I.D. 552). Subsequent rulings extended that rule to national parks, *Yosemite National Park,* 25 L.D. 48, to Indian reservations, *Navajo Indian Reservation,* 30 L.D. 515, and to irrigation (reclamation) projects, *Arid Land, etc.,* 32 L.D. 387; *E. C. Kinney,* 44 L.D. 580, 582. See also 1 Lindley, *Mines,* § 192 (3d ed. 1914). Similar rulings had been made, including by this Court, with respect to other types of possessory interests in federal lands, for example under the homestead laws. See, *e.g., Frisbie* v. *Whitney,* 9 Wall. 187; *The Yosemite Valley Case,* 15 Wall, 77, 89, 91; *Shiver* v. *United States,* 159 U.S. 491; *Russian-American Packing Co.* v. *United States,* 199 U.S. 570, 577, 578.

The latter cases are sometimes sought to be distinguished from mining claims on the ground that the mineral location constituted a particularly firm sort of property relation between the government and the locator.

See, *e.g.*, *Lindley, supra,* at 400. But while it has been repeatedly said, including by this Court in *Krushnic,* that a mining claim "is property in the fullest sense of that term," 280 U.S. at 316, such statements have usually been qualified by the observation that this is true only "so long as [the locator] complies with the provisions of the mining laws." *Id.* at 317; see also, *e.g.*, *Gwillim* v. *Donnellan,* 115 U.S. 45, 49 (a "valid *and subsisting* location of mineral lands, made *and kept up* in accordance with [the laws] * * *"; emphasis supplied).

Moreover this Court only rarely had occasion to address the issue where the government was the adverse claimant of the land. One prominent case in which it did have such an occasion—though not one involving the assessment work controversy—resulted in a statement which quite carefully erases any distinction between mining claims and other types of possessory rights over federal land in the withdrawal context:

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. * * * [*Cameron* v. *United States, supra,* 252 U.S. at 460.]

See also *Black* v. *Elkhorn Mining Co.,* 163 U.S. 445, 450; *Union Oil Co.* v. *Smith,* 249 U.S. 337, 349; *Cole* v. *Ralph,* 252 U.S. 286, 295.

In fact, the rule regarding withdrawal of land encumbered by mining claims was not quite so simple although, as will be seen, the qualification does not affect the government's position in this case. Approaching the problem rather conceptually, the responsible officials considered that a withdrawal to create some national preserve could be accomplished in either of two ways: (1) the government could withdraw to public use only those lands within the described boundaries which were not subject to valid mining claims; (2) it could withdraw to public use *all* lands, but existing valid mining claims would be impressed with a possessory right in favor of the locator. In the first case, the lands would never become part of the public reservation and consequently would always be open to relocation by others; in the second, relocation was not possible, but the land could be drawn into the reservation if the original locator ever failed to keep it up. The difference between the two was said to depend on the wording used in creating the reservation; the

theory is fully set out, and examples are given, in *Navajo Indian Reservation, supra.*

What is important here is that no one ever suggested that locations might be immunized *both* from relocation *and* from government withdrawal in the event of lapse. The form and policy of the Mineral Leasing Act make quite clear that oil shale lands were withdrawn from relocation—the *only* exception to the requirement of leasing was for valid, existing claims *which were maintained.*

> Such being the case, [respondents'] claim that performance of assessment work is a matter of no concern to the Government comes to this: By the withdrawal all subsequent locations are barred, yet the Government may not take advantage of any default or abandonment of a claim during the existence of said withdrawal, no matter how complete the abandonment or how pressing the need for the land for public purpose. No reason exists, therefore, for the performance of the annual labor prescribed as necessary to maintain a right to possession; and the locator is, by the fact of the withdrawal, sheltered from the consequences of his failure to perform the work prescribed by the statute, and said statute is repealed as to lands so withdrawn. The entire lack of justification, either legal or equitable, for the result above indicated clearly demonstrates the fallacy of the claim * * *.

Interstate Oil Corp. et al., 50 L.D. 262, 266–267. See also, in addition to the cases cited above, *Cronberg* v. *Hazlett,* 51 L.D. 101; *Krushnic,* 52

L.D. 282, and 295; *United States* v. *Ruddock et al.*, 52 L.D. 313; *Standard Shales Prod. Co.*, 52 L.D. 522;[22] *Hodgson* v. *Midwest Oil Company*, 17 F.2d 71. We know of no decision to the contrary, and suggest that it is entirely possible that the Court would have ruled the other way in *Virginia-Colorado* had it been apprised of this background. For since unpatented and unperfected claims had always been subject to defeasance by the United States for want of assessment work when the land was withdrawn without possibility of relocation, the 1920 Mineral Leasing Act did not, in fact, change existing law.

This Court's decision in *Krushnic* held that the 1920 Act, alone, did not withdraw the land. Because a located claim on which assessment work has lapsed and which is therefore subject to relocation subsists until relocation during a period of lapse, the *Krushnic* Court apparently reasoned that government action of dignity at least equal to relocation was required before land subject to a claim could be withdrawn. But it is clear that the government need not behave in all respects as a private relocator would—for example, by going into a state court to settle any dispute over the right to possession. *Humboldt Mining, supra.* Nor could the government be required to wait, before making its claim, until some third party sought possession of the land, as for a lease or homestead. In the first

[22] Departmental decisions to the effect that the government had no interest in the performance of assessment work did not involve areas which had been withdrawn. *Re Wolenberg*, 29 L.D. 302, 304; *Nielson* v. *Champagne Min. & Mill. Co.*, 29 L.D. 491, 493.

place, such a holding would ignore the existence of public as well as private uses for the land; secondly, lessees and homesteaders derive their possessory rights from the government, and could have no greater claim than it does. Thus, whatever was missing in *Krushnic* was supplied by the time of *Virginia-Colorado,* when the government had proceeded individually against each claim during a period of assessment work lapse, and had withdrawn oil shale lands even from leasing, under undoubted statutory authority, in aid of its management of the public domain. To say that the claims nonetheless need not be worked to preserve their validity deprives the statute's maintenance clause of any meaning; for if the claims need not be worked to preserve them, it can be argued that even abandonment cannot be inferred from the fact that such work has not been done.[23]

B. THE BACKGROUND AND LEGISLATIVE HISTORY OF THE MINERAL LEASING ACT OF 1920 MAKE CLEAR THAT CONGRESS BELIEVED THE MAINTENANCE-OF-CLAIM PROVISION OF THE STATUTE WOULD REQUIRE DILIGENT WORKING OF CLAIMS.

The government's *Krushnic* brief as well as its *Virginia-Colorado* brief omitted almost entirely any mention of the legislative materials bearing on the meaning of what is now 30 U.S.C. 193:

> That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands

[23] See also p. 45 n. 18, *supra*. Of course, the government would be able to show abandonment where, as in some of the claims in this case, the original locators or their heirs have sold their interests to speculators for paltry sums. But that does not suffice to answer the cases where the original locators themselves claim patents, or the quitclaim deed passes for a higher price.

> valuable for such minerals * * * shall be subject to disposition *only* in the form and manner provided in this Act, *except as to valid claims* existent at date of the passage of this Act and thereafter *maintained in compliance with the laws under which initiated,* which claims may be perfected under such laws, including discovery. (41 Stat. 451; emphasis supplied.)

Also unnoted was the existence of an alternative mode of preserving existing claims:

> [A]ny person having a valid claim to [oil shale] under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation. [41 Stat. 446].

Both the legislative materials, and the optional choice, indicate clearly that Congress contemplated that claimants to minerals affected by the Act, including oil shale, would *with dispatch* either convert their holdings to lease, if permitted, or reduce them to patent. It never considered that they would be able simply to sit on their rights, enshrouding the public domain for years with cloud and uncertainty, without in any material way encouraging development of public resources or the public domain.

1. The legislative materials

The starting point for discussion of the legislative materials is the observation that the oil shale problem was a very small part of the context out of which the

Mineral Leasing Act of 1920 arose. Pressure for that Act began in the first decade of the century when the President withdrew from location coal, oil, and phosphate bearing lands, and the first bills introduced made no mention of oil shale. By the time oil shale was brought within the coverage of the proposed Act, the maintenance-of-claim provision—which applies to *all* minerals under the Act—had already taken its basic shape. In particular, debate and discussion focussed on the issue which had engaged attention since the President's withdrawal from location of all known public oil lands in 1909: whether persons in the course of drilling, but who had not yet discovered oil, were entitled to continue their search after withdrawal, and under what conditions.

So far as we have been able to determine, the first inclusion of oil shale in the leasing bills which led to the 1920 Act was in the House substitute for S. 2812 of the 65th Congress, Second Session—a bill which was before the Congress in 1918 and failed through filibuster in the Senate at the end of the Congress. In the Senate, the bill had dealt only with coal, phosphate, oil, gas, potassium and sodium, 56 Cong. Rec. 384 (1917); in considering the withdrawals of public lands which had already occurred, the Senate was apprised that 56 million acres of public land had been withdrawn from location, including 45 million for coal and over 6 million for oil, but only 132,000 acres for oil shale (*id.*, 389).

House Report No. 563, 65th Cong., 2d Sess. (1918) proposed adding oil shale to the list of minerals, and provided

> That any person having a valid location to [oil shale] under existing laws on January first, nineteen hundred and eighteen, shall, upon the relinquishment of such location, be entitled to a lease * * * [at 5].

Although the House provision also provided for a saving clause as to valid claims for any mineral affected by the bill which were "maintained in compliance with the laws under which initiated," at 8, no mention of that clause was made in discussing the treatment of oil shale; the Committee remarked only that

> There are reported to be numerous locations upon these lands under the general placer mining laws and provision has been adopted that any person having a valid location of such minerals prior to January 1, 1918, *may, upon relinquishing his claim, be entitled to a lease* under the provisions of the section. [At 18; emphasis supplied].

The reason for not mentioning the possibility of patent is clear. Discussions of the saving clause were permeated with the understanding that diligence would be required in maintaining any claim thus saved, *e.g.*, 56 Cong. Rec. 487–488, 563–578 (Senate); 7034, 7104 (House), and the House well knew that commercial use of oil shale—and hence commercial development of oil shale locations—was years away. H.Rep. No. 563, *supra*, at 18.

Except for oil shale, of course, there was no real problem about diligence once a discovery was made of minerals subject to the act; they all had substantial present value. In the years before 1918, the often fierce debates over the leasing bills and their saving

clauses centered on the individual who was drilling for oil but had not yet discovered it. Beginning with the Act of 1910 authorizing Presidential withdrawals, (45 Cong. Rec. 8667–8672 (1910)) through H.R. 16136 of the Sixty-Third Congress (51 Cong. Rec. 15295–15297, 15424–15425 (1914); 52 Cong. Rec. 5154–5155 (1915)), and H.R. 406 of the Sixty-Fourth Congress, (S.Rep. No. 319, 64th Cong., 1st Sess. 3–6, 53 Cong. Rec. 1092–1095 (1916)), the emphasis was on their plight and the need for them to be diligent in working thier claim in order to qualify for relief.[24] This familiar proposition readily carried forward into the discussion of the 1918 bill.

When the Sixty-Sixth Congress came to debate the Leasing Bill, S. 2775, everyone was familiar with what had gone before—the bill introduced was identical with S. 2812, *supra,* and there was no Senate Report. 58 Cong. Rec. 3886 (1919). The Senate had always been the focus of resistance to leasing, and a stronghold of the pressure to protect the interests of those who were on the public lands drilling for oil. The debates there, again, talked of the Act and its saving

[24] By the act, as now reported, it is provided in substance that those who had entered and, prior to any withdrawal, had done a substantial amount of work, and who have since developed their claims with reasonable diligence and discovered oil, shall receive patents. That those who entered after the first presidential order of withdrawal, but prior to the [1910 Act] and the further withdrawals thereunder, shall receive preferential leases * * *.

In no instances are patents or leases provided for except where the location or claim has been developed and discovery of oil has been or shall be made therein. [S. Rep. No. 319, *supra*, at 5.]

provision almost entirely in terms of those interests; and the amendment made of the latter, to insert the words "including discovery" at its end, was to assure that they would be protected. 58 Cong. Rec. 4111-4112, 4443–4444, 4577–4584, 4770–4771 (1919). It is clear, again, that Congress was not considering or proposing the adoption of a system under which persons could make a location based on a common, presently unusable rock and then simply hold it, without investment or development,[25] for decade after decade, until its value could be realized. The mining laws had never been adopted to that speculative end. "The entire lack of justification, either legal or equitable, for [that] result * * * clearly demonstrates the fallacy of the claim * * *." *Interstate Oil Corp. et al., supra*, 50 L.D. at 267.

2. The factor of choice

A structural consideration points to the same conclusion. Congress gave oil shale placer claimants who had established claims before January 1, 1919 a choice—they could maintain their claims under the savings clause *or* they could trade their claims in on a lease. That lease could be for an indeterminate period and—particularly important here—the Secretary was authorized to "encourag[e] the production of petroleum products" from shales by "waiv[ing] the pay-

[25] Such assessment work as was ever done on oil shale claims rarely looked to its commercial development. Rather, locators made random, shallow trenches in the earth, to whatever extent appeared necessary to justify the assertion that the work had been done. See, *e.g.*, App. 166–174, 251–253.

ment of any rental or royalty not exceeding the first five years of any lease." 41 Stat. 446. Thus, under the lease, there would be a five year period during which the lessee would be freed from any obligations of financial expenditure in the maintenance of his claim. That respite would be valuable—and a lease desirable over a location—only if a claim would otherwise have to be worked. And it is plain that changing the pattern of exploitation of the minerals subject to the act from a patent system to a leasing system was the purpose of those who worked for enactment of the bills. That they would have wished such an encouragement to switch to leases cannot be doubted.[25] That they would have permitted only five years of unproductive landholding under a lease, but (to date) fifty years of unproductive landholding under the existing locations is incomprehensible, and deprives of any meaning the requirement that the claims be "maintained."

We do not discuss in this brief whether the Secretary initially, mistakenly interpreted *Virginia-Colorado* as having ruled that he lacked subject-matter jurisdiction over the assessment work cases, or what the effect of such an interpretation would be on his present ability to give effect to those cancellations which were proper as to service and process and which became final before the decision in that case. As respondents observed in opposing certiorari, that issue is not here. Nor do we address the several efforts he made to secure legislative relief from some of the effects of *Virginia-Colorado* in following years (*e.g.*,

[25] Similar inducements were made regarding oil prospectors, *id.* at 443, 445.

App. 68, 114, 213). While it would be impossible to deny that patents have been granted despite such cancellations and that the legislative efforts failed, neither can we conceive that the mistakes which may have been made forfeited for all time government interests in this vast, valuable, and as-yet undeveloped portion of the public domain to speculators and others who may be able to forge some more-or-less tenuous link to the original locators of half a century ago. *United States* v. *California,* 332 U.S. 19, 39–40; *United States* v. *San Francisco,* 310 U.S. 16, 31–32.

Indeed, it was the error of *Virginia-Colorado,* which we hope we have shown above, which to a substantial degree fathered the legislative failures. Viewed against the mining laws as a whole, that opinion made it appear that the locations before 1920 had created a vested property interest which could not be cut back without raising serious questions whether property had been taken without compensation. In such a situation, legislative overruling could not readily be expected; the more effective remedy would be for this Court to rule, as we believe we have shown to be the case, that its reading of the statute in *Virginia-Colorado* was mistaken, and that no such interest ever existed.

In the end, the issue comes down to whether the mining laws are to be applied to sanction what is and has been basically speculation in highly attenuated interests in land. The lands here, purportedly located as valuable for oil shale before 1920, have never been used for the commercial manufacture of oil from shale. The ~~only~~ economic use of them of which we

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are aware is that for a time some locators sought to use or lease the located lands for grazing livestock—an abuse which the Department soon stopped (App. 225-227). The mining acts were never meant for such a purpose. They were adopted to promote the development of the nation's mineral lands. When that development is not carried forward in even the minimal degree the assessment work provisions stipulate and the nation needs the land for a specific public purpose, it is entirely appropriate and permissible under the statutes for it to take it back. As we have shown, that principle was firmly established when the Leasing Act was enacted, and enactment of that law did not suspend the operation of the principle for the lands here involved.

CONCLUSION

The opinion of the United States Court of Appeals for the Tenth Circuit should be reversed. If necessary, the opinion of this Court in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, should be limited, or overruled.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
S. BILLINGSLEY HILL,
THOS. L. MCKEVITT,
EDMUND B. CLARK,
Attorneys.

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